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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1368

HAROLD KONIGSBERG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANK A. LOPEZ,
Member of the
Bar of the Supreme Court
of the United States,
Attorney for Petitioner
HAROLD KONIGSBERG,
Office & P. O. Address,
44 Court Street,
Brooklyn, New York 11201
Telephone (212) 522-0760.

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No. .....

HAROLD KONIGSBERG,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Third Circuit, entered in this case on November 28th, 1969 (Appendix D, and E, pp. 17a and 24a).

Opinion Below

The Court of Appeals, Third Circuit, rendered an opinion affirming the order of the United States District Court for the District of New Jersey (Appendix D, p. 17a).

The opinion-order of the District Court is unreported (Appendix B, p. 2a) and the opinion of United States Court of Appeals is as yet unpublished (Appendix D, p. 17a).

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Jurisdiction

The order and judgment of the Court of Appeals, Third Circuit (Appendix D, p. 17a, *infra*) was made and entered November 28th, 1969. The jurisdiction of this Court is involved pursuant to Title 28 U.S.C. § 1254(1).

Question Presented

Whether the Court erred in denying petitioner a hearing pursuant to Title 28 U.S.C. § 2255 in that (a) an inculpatory statement obtained by custodial arresting officers through force and violence and attributed to petitioner should have been excluded from evidence in the trial proper as violative of the United States Constitution, Amendment V and VI; (b) in that petitioner was denied a hearing, *Jackson* v. *Denno,* 378 U.S. 368, on the admissibility of an alleged admission during and previous to trial, and (c) in that petitioner was denied on his § 2255 application to collaterally raise the issue of standing to attack evidence unconstitutionally seized and admitted against him in the Court of trial in violation of the United States Constitution, Amendment IV.

Constitutional Provisions Involved

The constitutional provisions involved are Fourth, Fifth and Sixth Amendments and are printed herein as Appendix F, p. 24a).

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Statement of the Case

This is an appeal from the affirmance of the Court of Appeals, Third Circuit, of an order of the United States District Court of New Jersey (Lawrence A. Whipple, *J.*) denying petitioner a hearing on his pro se motion to vacate his sentence and judgment of conviction pursuant to Title 28 U.S.C. § 2255.[1]

The petitioner was convicted in the United States District Court of New Jersey (Robert Shaw, *J.*) under Criminal Docket No. 31-62, for violation of 18 U.S.C. § 659 (unlawful possession of goods stolen from interstate commerce) and was sentenced on July 16th, 1963, to a term of ten (10) years.[2] The conviction was affirmed in *United States* v. *Konigsberg,* 336 F.2d 844 (3rd Cir. 1964). The United States Supreme Court denied certiorari in 379 U.S. 933, 13 L. ed. 2d 344 (1964). No other motions or applications have been filed related to this action other than the instant § 2255 application.

The Court of Appeals, Third Circuit, in its consideration of petitioner's direct appeal stated the facts as follows, *United States* v. *Konigsberg, supra,* at pp. 851-852:

> "The subject matter here involved was some stolen clothing. Konigsberg was one of five people found with the merchandise. At the time of trial he was thirty-five years old. He had been convicted of robbery in 1949. From his own testimony he was well acquainted with police arrest procedures. All of the people in the garage were told 'This is the F.B.I. You are under arrest.' The prisoners were instructed

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[1] In the United States District Court case carried Civil No. 465-68.

[2] Petitioner is still presently confined under service of this sentence at the U. S. Medical Center for Federal Prisoners in Springfield, Missouri.

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to put their hands against the garage wall. Konigsberg refused so the officers put handcuffs on him. Shortly after that all the prisoners were taken to the F.B.I. office in Newark, a few miles west of Bayonne, in several ordinary passenger cars driven by agents. Konigsberg rode with Agents Straub and Roetzel. Straub advised him that he was entitled to an attorney and that anything he said might be used against him in a court of law. At the F.B.I. office the prisoners were fingerprinted and photographed. Konigsberg had approximately $11,000 currency on his person which he meticulously counted with the agent. Straub testified that '* * * we asked him the circumstances as to why he was in the garage and just what had taken place. * * * We desired to talk and see if he wished to cleanse himself or explain. * * * As to why he was there.' Straub answered, 'If he could explain. We wanted to hear his side of the story that would come from him, if it would. We had to fingerprint Mr. Konigsberg. We had to photograph him.' Agent Roetzel also there, said that in the course of the talk Konigsberg '* * * made a statement that this was the only legitimate arrest that the F.B.I. had ever made of him. He made a statement that this was one thing we had, meaning the F.B.I. * * * He made the statement that there was one thing that we had that he didn't have, and that was stool pigeons, and he made the statement when he was asked what he was doing in the garage, he said, 'In what garage?' Then followed by a statement that, 'I was trying to help a fellow out."

In the § 2255 application in the District Court Konigsberg collaterally attacked his conviction contending that the judgment is constitutionally impermissive in that it is violative of the United States Constitution, Amendments IV, V and VI. Specifically, he argues:

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1. That new evidence made available to petitioner as a result of a New York State post-conviction hearing in the New York County Supreme Court to determine if he was then a multiple felony offender resulted in eliciting testimony from the same F.B.I. agents who were also witnesses at petitioner's trial resulting in the instant conviction. The testimony at the subsequent post-conviction hearing in the New York State Court established without question that the Government suppressed and/or knowingly withheld evidence from the Court and defense at Konigsberg's trial and, that furthermore, petitioner's right to counsel was abridged and moreover that a purported statement attributed to Konigsberg was received in evidence in violation of the United States Constitution, Amendments V and VI. The admission into evidence of the alleged inculpatory statement attributed to petitioner under the *totality of circumstances* from the trial proceedings coupled with the subsequent New York Supreme Court testimony resulted in demonstrating that a constitutional violation affecting *due process* infected the trial process making possible a conviction in an otherwise dubious case.

2. The petitioner further raised anew the issue of *standing* in his pro se § 2255 application in the District Court, a matter previously adjudicated against him on a pre-trial motion to suppress and preserved on appeal to this Circuit Court. *United States* v. *Konigsberg, supra,* at page 847. However, in view of recent Supreme Court decisions clarifying the issue of *standing* among the various circuits with retroactive effect petitioner contends that the ruling against him in this Court misapplied constitutional standards and was tantamount to a due process deprivation. Furthermore, that he has standing to raise this issue in a § 2255 application.

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Reasons for Granting the Writ

a) The Court should have granted a hearing pursuant to Title 28 U.S.C. § 2255 on petitioner's contentions:

(1) That an inculpatory statement obtained by custodial arresting officers through force and violence and attributed to him should have been excluded from evidence as violative of the United States Constitution, Amendments V and VI:

The District Court acknowledged and expressed itself unequivocally when it stated 28 U.S.C. § 2255 places an "affirmative duty to look into the files and records of the case and only if they *conclusively show* that the petitioner is entitled to no relief, can this motion be dismissed without an evidentiary hearing" (O. 2-3).[3] While the District Court did not allude to same, it is also true that the general rule is that in a § 2255 motion an allegation of fact made in support of the application must be accepted as true. *United States* v. *Hayman*, 342 U.S. 205, 96 L. ed. 232 (1952).

The Opinion-Order of the District Court maintains that petitioner's application cannot be used to act as a substitute for relitigation of his direct appeal. In conclusion, the District Court asserted that Konigsberg's contentions were a *de novo* attempt to reargue trial issues under different labels and that consequently an evidentiary hearing would prove nothing new that was not otherwise known to the District Court. It was District Court Judge Whipple's opinion that an evidentiary hearing would therefore on examination of the record in the District Court and the

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[3] Unless otherwise specified numerals preceded by the letter "O" refer to pages of Judge Whipple's Opinion-Order; numerals preceded by the letter "R" refer to the U.S.D.C. trial minutes and numerals preceded by letters N.Y. refer to record of hearing in New York County Supreme Court, a court exhibit hereto.

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New York Supreme Court viewed in a light most favorable to the petitioner prove fruitless to his cause. The District Court in its written Opinion-Order spoke accordingly (O. 10):

> "This is merely a collateral attempt by the petitioner to contradict the record made in the trial court in the 1963 federal trial. The record in this case completely contradicts petitioner's claim in this regard and compels the conclusion that in view of the allegations made and in view of the record and files, as well as the transcripts, this claim is without merit."

The Court of Appeals adopted the view of the District Court in stating that the New York State transcripts revealed no "substantial discrepancies from the testimony of the agents at the 1963 trial" (Appendix D, p. 17a).

An examination of the Opinion of the sentencing Court in the disposition of Konigsgerg's § 2255 application coupled with the view of the Third Circuit in affirming petitioner's conviction on direct appeal furnishes important background information reference the issue in contention. Briefly stated, petitioner with undeviating consistency attacked the inculpatory statement attributed to him. This District Court justified the inclusion into evidence of that statement on the rationale that when "F.B.I. agents talked with Konigsberg the process was definitely investigative and never shifted to accusatory." *United States* v. *Konigsberg, supra*, at page 852. In their fact-finding ruling to substantiate their legal theory both the District and Circuit Courts established the following, *Konigsberg, supra*, at pages 851-852:

1. During the investigatory stage, the petitioner's identity was not established until after the F.B.I. informed petitioner he was under arrest. As a matter of fact, F.B.I. Agent Straub indicated he was surprised to find the petitioner in the garage.

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2. During the investigatory process, the F.B.I. ordered petitioner (the Court at this juncture called him a "prisoner") to place his hands against the garage wall.

3. During the investigatory phase, when petitioner or prisoner, as the Court called him, was handcuffed when he refused to place his hands against the garage wall.

4. During the investigatory stage, the petitioner, again called prisoner, was driven by F.B.I. agents a few miles west of Bayonne to the Bureau's office.

5. During the investigatory process, F.B.I. agents informed Konigsberg that anything he might say would be used against him.

6. During the investigatory phase, the petitioner was mugged and fingerprinted.

7. During the investigatory stage, the F.B.I. searched the person of the petitioner and counted $11,000 currency on his person.

8. During the investigatory phase, the petitioner was handled in-custody administratively as F.B.I. procedure required of an arrested person.

At this point, the Court affirmed the District Court trial ruling that the "process was definitely investigative and never shifted to accusatory." *Konigsberg, supra,* at page 853. However, additional facts were revealed in the New York Supreme Court hearing as follows:

9. F.B.I. Agent Straub testified that before the purported statement was made the petitioner demanded to telephone his lawyer but this request was refused a number of times and it was not permitted until after the alleged statement was made (N.Y. 780, etc.).

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10. F.B.I. Agent Straub indicated that it was not until after three hours after Konigsberg's arrest was he allowed to call his lawyer (N.Y. 780).

11. Agent Straub admitted that petitioner was physically restrained from using the telephone to call his attorney for assistance previous to making the alleged statement (N.Y. 780, 792-794).

12. F.B.I. Agent Straub testified that he actually arrested petitioner and he was not making an investigation thus negating his trial testimony that he was trying to give Konigsberg a chance to explain himself (N.Y. 798-799).[4]

13. The administrative functions carried out by the F.B.I. involved an arrest procedure in preparation for arraignment before a United States Commissioner and not part of the investigatory stage all.

It is noteworthy to note in connection with ¶ 13 *supra* that a person held for investigation is not fingerprinted and photographed. The usual practice of the F.B.I. is for fingerprinting and photographing to be handled by United States Marshals previous to arraignment. Konigsberg was photographed and fingerprinted previous to the incriminatory statement attributed to him. Whether one believes the contradictory testimony of the prosecution in the District Court as against the testimony in New York Supreme Court (R. 1066 and N.Y. 341) the fact is that the petitioner was handled for purposes of arraignment and not investigation.

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[4] References to the fact that petitioner was under arrest as the term was used by the F.B.I. are replete throughout the trial record of the United States District Court T. 268, 311, 358, 360, 361, 385, 386, 387, 388, 440, 442, 481, 482, 515, 526, 527, 633, 718, 742, 748, 749, 753, 838, 847, 857, 916, 918, 920, 1062, 1065, 1066, 1107, 1108, etc.

Petitioner maintains that if the *Nisi Prius* Court had been furnished the facts as they were subsequently presented at the New York Supreme Court multiple felony hearing, the exclusionary rule would have been compelled by the then constitutional mandate in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964), and under the *totality of circumstances*. In the *Escobedo* decision, *supra*, this Court wrote:

> "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

Along with all the factors concerning the in-custody interrogation of the petitioner is the circumstance that the arrest here unquestionably took place somewhere around 9:30 p.m. on January 11th, 1962. While enroute from Bayonne to Newark, Konigsberg asked permission to make a telephone call to his lawyer. The F.B.I. refused to allow him to do so (R. 879, 882). F.B.I. Agent Straub's own statement corroborated by that of Agent Roetzel clearly admits that petitioner asked several times to telephone his lawyer and that on each occasion he was refused (R. 883, 884, 887, 889) and furthermore petitioner was *physically restrained from so doing* (N.Y. 790). The presecution pretense for such conduct was that the F.B.I. was interested in giving Konigsberg an opportunity to present his side of the story (R. 865). In other words, having given lip-service to petitioner's right to counsel their aim was perfectly clear. The prosecution and their agents wanted conversation from the petitioner and if possible such that would incriminate petitioner by his own mouth. Assuming the F.B.I. statements to be true, they succeeded masterfully! It is precisely this type of conduct that this Court struck down as amounting to a constitutional infirmity. *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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After several hours of conversation and approximately at 1:30 a.m., according to the prosecution, or 3 a.m. or 4 a.m., according to the defense, of January 12th, 1962 (R. 882, 1859) the petitioner was able to telephone his lawyer. By this time the statement attributed to petitioner was already claimed by the F.B.I. (R. 890, 891).

On the issue of voluntariness it is also important to consider the *totality of circumstances* concerning the appellant's apprehension, arrest and arraignment before the United States Commissioner. *McNabb* v. *United States,* 318 U.S. 332 (1943) and *Mallory* v. *United States,* 354 U.S. 449 (1957) require that a federal defendant be brought without unnecessary delay before the nearest available commissioner lest statements obtained be excluded. The rule is concerned with the Fifth and Sixth Amendments of the United States Constitution and is grounded on Rule 5 (a) of the Federal Rules of Criminal Procedure. It must likewise be considered on the issue of voluntariness and within all the circumstances concerning the alleged admission attributed to petitioner.

Considering the facts here under the most optimum circumstances for the prosecution it is apparent from all the evidence that at the time of the questioning petitioner is in-custody and under arrest. Konigsberg is informed by the custodial authorities that he is entitled to an attorney but they refuse him the right to either call one and use physical restraint to prevent his grabbing a telephone for this admitted purpose. *The right proffered to him is forcefully denied.* If nothing else but this had been said in the New York State Supreme Court testimony of the F.B.I. agents a hearing was compelled by petitioner's § 2255 application below. The F.B.I. waits and continues to talk to the petitioner. The impression created is that the F.B.I. is giving the petitioner an opportunity to talk himself out of their headquarters. Such a contention by the prosecution is absurd. *It defies the facts that the petitioner was*

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told he was under arrest, seized, handcuffed, transported, searched and property seized, fingerprinted, mugged and denied counsel. If after all of this it is the claim of the prosecution that they merely wanted to hear Konigsberg's side of the story credibility is taxed. Instead of a prompt arraignment as required by judicial decision and the Rules of Criminal Procedure, there is a significantly delayed arraignment for petitioner is not brought before the United States Commissioner from the time of his arrest on January 11th, 1962 at 9:30 P.M. until January 12th, 1962 at approximately 3 P.M. The delayed arraignment of the petitioner was for the exclusive purpose of eliciting statements from him under the circumstances as stressed by the testimony in the New York State Supreme Court proceedings. Such conduct makes mandatory the application of the *McNabb-Mallory* rule and the exclusion of the statement. Had District Court Judge Whipple in his Opinion-Order permitted a hearing the petitioner would have more fully developed the facts of this delayed arraignment as reflecting upon the issue of voluntariness.

A hearing would have determined if Konigsberg was deliberately secreted from his then counsel specially in view of the fact that defendant was being moved from F.B.I. headquarters to local police officers and petitioner's attorney found it impossible either to locate or communicate with his client. An evidentiary hearing would have settled this matter and established the "hide and seek" game the F.B.I. played and its consequences on the *totality of circumstances.*

The Opinion-Order of the sentencing Court recognized that Konigsberg was not disputing that a § 2255 proceeding cannot be used to act as a substitute for a direct appeal (O. 2), and while *Dirring* v. *United States,* 370 F.2d 862 (1st Cir. 1967) at page 864, ruled "on a motion to vacate sentence or judgment we will not re-review grounds for relief previously considered and determined," the admitted

question is "whether petitioner is entitled to a hearing on his motion (O. 3)." The petitioner here raises issues of constitutional magnitude while in *Dirring, supra,* at page 861, the Court opined the grounds advanced there were frivolous. "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders* v. *United States,* 373 U.S. 1, 10 L. ed. 2d 148 (1963)—The District Court Opinion-Order asserted that "there appears to be little doubt or disagreement that issues disposed of on appeal from the original judgment of conviction will not be reviewed again under § 2255 if the precise issues were raised on direct appeal (O. 2)." The sentencing Court cited *Sykes* v. *United States,* 341 F.2d 104 (8th Cir. 1965) for this proposition but this case suggests nothing to the effect what the result would have been had additional facts been presented in that litigation laying the basis for a constitutional claim. In *Fryre* v. *United States,* 337 F.2d 385 (7th Cir. 1964) also cited by the sentencing Court in its opinion is inapposite. Here, Frye did not aver additional facts to his argument in order to support his constitutional contention and his second claim in support of his § 2255 motion asserting a failure to comply with Federal Rules of Criminal Procedure, 32(a) (right of allocation) was not of constitutional import nor was it jurisdictional. On this basis Fryre was denied in his § 2255 effort.

Likewise cited in the Opinion-Order is *Baca* v. *United States,* 383 F.2d 154 (10th Cir. 1967) in which Baca urged three grounds in his § 2255 application. As far as the grounds related to the hostility and bias of the trial judge and the refusal to grant a new trial on newly discovered evidence there was not a scintilla of additional facts to support these allegations all of which had been specifically adjudicated on direct appeal. In the *Baca* case, *supra,* the Court was primarily concerned with the issue of general sentence and in this respect is unlike the issue raised by petitioner here.

Also cited by the sentencing Court in its Opinion-Order is *Lampe* v. *United States,* 288 F.2d 881 (D.C. Cir. 1961) where appellant attempted to raise on appeal an issue not raised in his § 2255 petition. The Court there felt it improper to consider the matter but in any case clarified that the issue of the voluntariness of Lampe's statement had been reviewed on his direct appeal. Unlike the present case there was no additional supporting evidence to bolster the § 2255 claim of constitutional deprivation.

It is in the interests of justice that petitioner here claims that the sentencing Court should have afforded him at the very least a hearing to determine on the merits whether under the *totality of circumstances,* the statement attributed to him should have been excluded from evidence. *Sanders* v. *United States, supra.*

The sentencing Court in its Opinion-Order did not fully realize the implication of appellant's arguments. It maintained (O. 5-6):

> "If the legality of petitioner's detention has been decided adversely to him on direct appeal, in determining the right to § 2255 relief, the issue becomes whether adequate relief had been afforded at that time. During the petitioner's 1963 federal trial, pursuant to the testimony of the FBI witnesses, as well as other evidence, the trial court found that while in custody he was fully and completely advised of his constitutional rights to the extent that he was notified of his right to counsel; he was warned before he made any statement that he was not required to make statements; and he was informed that anything he said could be used against him in a court of law. . . . The legality of his detention was raised and decided adversely to him on a direct appeal, *Konigsberg, supra,* and may not be relitigated."

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The Court of Appeals and District Court in concurrent findings ignore that the additional facts obtained through the testimony of F.B.I. Agent Straub and Roetzel showed a forceful restraint and an effective denial of counsel after having proffered the right (N.Y. 792). The petitioner does not argue for a retroactive application of *Miranda* v. *Arizona,* 384 U.S. 436 (1966) but maintains that he was denied effective assistance of counsel when he was physically stopped from calling counsel and that all the facts combined evidenced a *totality of circumstances* effectively denying him his constitutional rights to counsel and self-incrimination under the Fifth and Sixth Amendments of the United States Constitution. The issue here is not as the sentencing Court would have us believe one of retroactive application and relitigation but rather *due process* and *fair trial.* Under the total circumstances a fact-finding hearing should have been ordered by the Court and appellant should have been permitted to lay the foundation for his effective denial of due process.

Furthermore, the statement attributed to the petitioner is of pertinent and paramount importance when one considers that the Court specifically charged (R. 2268):

> "I further charge you that possession of property recently stolen if not satisfactorily explained is a circumstance from which a jury may draw the inference and find that the person in possession knew the property to have been stolen. The same inference may be drawn from a false explanation of such possession."

On the question of the *totality of circumstances* the Court by this charged imposed a burden upon the petitioner to come forward and explain. It totally disregarded the spirit of the Fifth Amendment which was later crystalized in *Miranda* v. *Arizona, supra,* that an accused need not convict himself by his own statement. The *Miranda* ruling applied from the commencement of the accusatory stage

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when a defendant becomes the specific target of the investigation. It is logical to assume that if defendant need not explain anything at that time a future burden imposed upon him at trial of explaining recent possession is constitutionally impermissive. This charge must likewise be considered with all the circumstances of the arrest and trial of the petitioner if one is to properly view here the total failure of due process. On all the issues raised by the record here which the sentencing Court indicated it had considered the petitioner's cause must be remanded to the District Court for a full and complete evidentiary hearing in order to determine whether in fact and in law the statement of incriminatory import should have gone to the jury for their consideration.

Reliance on *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) for the proposition that *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966) bars the application of the constitutional rules of each of those decisions to petitioner's claim of involuntariness is misplaced. The *retroactivity doctrine* which has crept into our constitutional law and which has met with criticism from this Court is not the issue here but as indicated previously, rather *fair trial* and *due process* in that under *the totality of circumstances* the incriminatory statement attributed to petitioner should have been excluded from evidence. *Desist* v. *United States,* 394 U.S. 478 (1964).

The distinction, of course, is that petitioner is arguing a *totality of circumstances* as affecting his constitutional claims on this issue of voluntariness. Notwithstanding the central issue of petitioner's argument, the *retroactivity doctrine* urged, although having been enunciated by our highest court, is a constitutional anomaly which has no foundation in our constitutional laws, and, as a matter of fact, is specifically prohibited by the United States Constitution itself in Art. 1, Section 9, Clause 3, when it outlawed the infamous *bills of attainder* of which the *retroactivity doctrine* is akin. *Bills of attainder* as inter-

preted by the Supreme Court prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of groups in such a way as to inflict punishment on them without a judicial trial." *United States* v. *Lovett,* 328 U.S. 303, 315 (1946). When the retroactivity doctrine was innovated by the court it was in effect usurping the powers of the legislature, not by interpreting the Constitution as is its right, but by legislating on which given Tuesday or Thursday the new constitutional precepts embodied in *Escobedo* and *Miranda, supra,* would go into effect. It is incongruous to note that petitioner raised the *Miranda* issues before Miranda himself. What amounts to a *bill of attainder* under label of *retroactivity* militates against petitioner in securing the benefit of his constitutional rights and thus deprives him of a judicial trial and appellate process and inflicts punishment upon him by the announced refusal of the Court of Appeals and District Court to apply existing constitutional law to him and thus granting a hearing.

(2) That petitioner was denied a Jackson v. Denno, 378 U.S. 368 hearing on the admissibility of an alleged admission.

Jackson v. *Denno,* 378 U.S. 368 (1964) overturned the previously upheld New York procedure in permitting the issue of voluntariness to go directly to the jury for their determination. This was overruled as the New York procedure could do no justice to the defendant's rights and that it contravened the due process clause of the United States Constitution as it applied to the States. It mandated the issue of voluntariness must first be determined by the Court even before the factors and circumstances surrounding the purported statements were introduced to the jury. *Jackson* v. *Denno, supra,* adopted the Massachusetts rule. It is evident that the petitioner here was likewise entitled to a hearing on this issue of the voluntariness of his statements outside the presence of the jury. As a matter

of fact petitioner Konigsberg's then counsel at the time the statement was about to be introduced against the appellant indicated to the Court (R. 845):

> "The foundation certainly has to be—and I am entitled to a preliminary hearing on it, which I hereby demand, as to the nature of the so-called instructions, where they were given, how they were given, what the conditions were."

The trial court permitted counsel to conduct a preliminary inquiry *but in the presence of the jury.* Sometime later and after the preliminary inquiry had undergone extensive testimony the Court indicated (R. 868):

> "We are dealing here with something in the nature of a confession, perhaps not a full confession but a—A very incriminatory statement or statements. Now, under these circumstances I do feel in connection with the interrogation as to the voluntariness of the statement that it might serve the best interests of justice if counsel are made aware of the statements before they are submitted to the jury so that I have an opportunity to hear all arguments fully with respect to them and the circumstances under which they were taken."

The examination of F.B.I. Agent Straub then continued outside the presence of the jury (R. 876). The fact is nonetheless that the jury had already heard a major portion of the preliminary hearing on voluntariness in their presence and at this time to continue the same hearing outside their presence was a futile act which did not correct the failure of due process nor did it afford sufficient protection to the petitioner's constitutional rights. Furthermore, when F.B.I. Agent Roetzel testified with regard to the same admission, despite the fact that Petitioner's counsel likewise demanded a hearing outside the jury's presence this application was denied by the Court (R. 1066, 1068).

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The proper procedure and the only procedure to have followed was as outlined in *Jackson* v. *Denno, supra,* which entitled petitioner to a full and complete hearing outside the presence of the jury as to all the statements and by all the witnesses the Government intended to call in order to sustain their burden on the issue of voluntariness. Furthermore, under such a hearing the appellant could have testified and presented witnesses outside the presence of the jury in order for the Court to properly and providently make a determination. The trial court failed in this and its procedure caused a fundamental failure of due process which adds to the necessity now to afford appellant a hearing on the entire issue of voluntariness which was the only significant factor in securing his conviction.

F.B.I. Agent Roetzel further testified that he was not present at all times with Konigsberg in custody. Roetzel took turns with Straub (R. 346). It was therefore necessary to examine Roetzel outside the presence of jury to determine inconsistencies and otherwise to learn if Roetzel was merely adopting Straub's testimony as to the alleged admission.

(3) That petitioner may collaterally raise the issue of standing to attack evidence unconstitutionally seized and admitted against him in the Court of trial in violation of the United States Constitution, Amendment IV, in a § 2255 application.

The sentencing Court in its Opinion-Order was cognizant of *Thornton* v. *United States,* 368 F.2d 822 (D.C. Cir. 1966) which held that only under "special circumstances" would a collateral § 2255 attack upon a conviction violative of the United States Constitution, Amendment IV be permitted. The sentencing Court in appellant's § 2255 application found no "exceptional circumstances present to warrant an exception to the general rule prohibiting collateral review" (O. 12).

The United States Supreme Court in *Kaufman* v. *United States,* 394 U.S. 217 (1969) ruled that a federal prisoner is entitled to seek § 2255 relief on claim that evidence used against him was obtained as a result of an unreasonable search and seizure. The sentencing Court did not have the benefit of *Kaufman, supra,* since the Opinion-Order was previous to this decision. It is therefore clear that petitioner's Fourth Amendment claim is here cognizable under § 2255 attack. The *Kaufman* decision was clearly foreseeable in *Sibron* v. *New York,* 392 U.S. 40 (1968) at page 61:

> "The Fourth Amendment is binding on all branches of government. The Government cannot authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct."

As an after-though the sentencing Court in its denial of Konigsberg's demand for a hearing opined that (O. 12):

> "Neither has petitioner demonstrated that a redetermination of this issue would serve the ends of justice. Therefore, collateral review is not available either on the law or by way of an evidentiary hearing inasmuch as there has been no showing that this ground for relief is cognizable by collateral attack or that the previous failure in the Court of Appeals does not bar collateral relief."

The sentencing Court in its determination relies on the disposition of the suppression issue raised on direct appeal this Court refused to apply the ruling in *Jones* v. *United States,* 362 U.S. 257, 4 L. Ed. 2d 697 (1960), explaining that where possession is the ingredient of the offense, standing to raise the issue of suppression and a Fourth Amendment violation are automatically conferred. The sentencing Court ruled petitioner here was not charged with a possessory crime exclusively, as was in fact the case, and found

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that since it was only one element of the charged offense of interstate theft the petitioner was compelled to make a showing of standing to raise a Fourth Amendment contention even if this was cognizable by § 2255 application.

Such an interpretation of the *Jones* case, *supra,* in the light of *Simmons* v. *United States,* 390 U.S. 377 (1968) results narrow and violative of due process. The prosecution is constrained to prove each element of the offense charged beyond a reasonable doubt. The fact that an offense involves several elements does not minimize his burden and it is violative of due process to hold that where the possession of the subject matter per se is against the law no showing need be made while if the subject matter is not per se against the law the defendant must lay a foundation for his attack makes the Fourth Amendment guarantee inoperative in a large number of cases. The *Kaufman* case, *supra,* in no uncertain terms elevates the protection of the Fourth Amendment right to equal that of any other constitutional guarantee. It was error to deny petitioner a hearing and a determination on the merits of his Fourth Amendment contention either on the grounds that it was not cognizable within § 2255 attack or that he failed to make a showing that he had standing to make a Fourth Amendment claim. Furthermore, in the latter connection the evidence at the trial clearly established that the right of the petitioner to be in the garage was never contested and to have ruled that he had no possessory interest in the premises in which the stolen subject matter was found, gave him no right to attack the possession of this very subject matter imputed to him by his lawful presence in the garage was to make jest with due process.

In *Simmons* v. *United States, supra,* Mr. Justice Harlan, speaking for the Court, at page 390, indicated:

> "In part to avoid having to resolve the issue presented by this case, we relaxed those standing requirements in two alternative ways in *Jones* v.

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> *United States, supra.* First, we held that when, as in *Jones,* possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs."

The Court in this recent case spoke of possession as "an element" not the only element or the exclusive element but one of the elements. The petitioner here was convicted of 18 U.S.C. § 659, a crime of *possession.* In *Simmons, supra,* Garrett complained about a suitcase here the articles are clothing.

The Court in *Simmons, supra,* at page 390, did not foreclose the "police-deterrent" rationale for the exclusionary rule enunciated in *Linkeletter* v. *Walker,* 381 U.S. 618 (1965) but simply did not reach this issue. In any event, the appellant was convicted of possession of stolen property which places him within *Jones, supra,* as defined by *Simmons, supra.*

Had the sentencing Court foreseen *Kaufman, supra,* and the applicability of raising a Fourth Amendment issue via a § 2255 petition the petitioner here through a fact-finding hearing would have established standing and asked the Court to apply the standards mandated by the Supreme Court recently in *Spinelli* v. *United States,* 393 U.S. 410 (1969) extending *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and applied favorably in *White* v. *Swenson,* 301 F. Supp. 447 (U.S.D.C. of Mo., 1969).

In the trial below the Government failed to utilize a search warrant it had obtained because of its obvious il-

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legality. It relied instead on probable cause to arrest on January 11th, 1962 and to make a search incident thereto. The only information the Government actually possessed was some inconclusive information from a tipster and the fact that the F.B.I. surveillance the day previous to the arrest and search revealed unidentified suits in a car which emerged from the garage where the arrest and search subsequently occurred. The sentencing Court obviously foreclosed appellant's request on the basis that he could not raise the § 2255 contention because of *Thornton, supra,* being unaware of *Kaufman, supra,* and therefore never reached the principles expounded in *Spinelli, supra,* making the search revealed at trial constitutionally repugnant.

The Court of Appeals found that even if Konigsberg's posture on standing is accepted, a § 2255 attack would be fruitless since the Trial Court in denying the motion to suppress not only found standing lacking but in any event ruled that the search and seizure proper and consistent with probable cause and other constitutional mandates. We cannot have it both ways. If petitioner's posture at the pre-trial hearing was to establish standing in order to bring on a Fourth Amendment attack on the unconstitutionality of a search and seizure he cannot be denied on one ground and justified on another. This would be less than due process.

What is important is that the § 2255 Court denied Konigsberg on this issue on the grounds that his petition did not fall within the *Thornton* special circumstances rule. The fact is that Konigsberg is now within the *Kaufman* rationale. He is entitled to a judicial determination on the basis of his § 2255 contention.

The argument is urged that *Simmons* v. *United States,* 390 U.S. 377 (1968) does not change the rule in *Jones* v. *United States,* 362 U.S. 257 (1960). The Government maintained correctly that "Jones is still limited to the situa-

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tion where possession is an essential element of the crime charged." *Konigsberg was convicted here of violation of 18 U.S.C. § 659, a crime of possession.* There can be no question that possession of stolen property was essential and paramount in this conviction. Simmons did not overrule *Jones* but clarified it to the extent of pointing out that possession need not only be the sole and exclusive element involved but only "an essential element", 390 U.S. 377 (1968) at page 390. True enough the Court considered *Hobson's Choice* and went on to indicate that a defendant could testify on the issue of a Fourth amendment violation without fear of this testimony later used at trial against him. However, the *Simmons* decisions expounded and affirmed the proposition that a defendant who wishes to assert a fourth amendment objection is not required to show that he is the owner or possessor of the seized property or that he had a possessory interest in the searched premises if the possession of the seized property is an essential element of this offense.

In *Mancusi, Warden* v. *DeForte,* 392 U.S. 364 (1967) the Court quoted *Jones, supra,* 362 U.S. at 267, for the proposition that "anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him." *Mancusi* went on to say that *Jones* explicitly did away with the requirement that to establish standing one must show legal possession or ownership of the searched premises. Moreover, in *Katz* v. *United States,* 389 U.S. 347, the Supreme Court made clear that the Fourth Amendment depended not upon a property right but was in fact a personal right involving a reasonable expectation of freedom from government intrusion. The import of the *Mancusi* decision as it effects *Jones* can best be understood through the dissent in *Mancusi* by Mr. Justice Black, at page 375:

> "The Court today puts great stress on the statement in Jones that 'anyone legitimately on premises where

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> a search occurs may challenge its legality . . . when its fruits are proposed to be used against him.' 362 U.S. at 267."

The minority opinion called it a "sweeping dictum". As it applies to Konigsberg, the evidence is void of any showing that he was a trespasser on the situs of the search and more important the evidence indicates that he was there under lawful authority.

Even without consideration of the subsequent decisions that explained and expounded upon *Jones* it is clear that the affirmance of the conviction against Konigsberg on this issue has been singled out for criticism. *Niro* v. *United States,* 388 F.2d 535, 537 (1st Cir. 1968). That case involved a case quite similar to the instant one and the court held that the defendant had standing where possession was an element of the offense charged. The Ninth Circuit has also recently agreed with the *Niro* interpretation of *Jones* in *Wattenburg* v. *United States,* 388 F.2d 853, 859 (9th Cir. 1968).

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CONCLUSION

May it please the Court, it is respectfully urged that the petition for a writ of certiorari be granted and may the Court exercise its supervisory powers over the administration of justice herein.

Dated: March 26, 1970.

Respectfully submitted,

FRANK A. LOPEZ,
Member of the
Bar of the Supreme Court
of the United States,
Attorney for Petitioner
HAROLD KONIGSBERG,
Office & P. O. Address,
44 Court Street,
Brooklyn, New York 11201
Telephone (212) 522-0760.

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APPENDIX A

Docket Entries

May 13, 1968 —Motion to vacate sentence pursuant to Title 18 U.S.C. § 2255

May 13, 1968 —Affidavit of Harold Konigsberg

May 13, 1968 —Notice of Allocation and Assignment

May 20, 1968 —Motion for disqualification of Judge Shaw

August 22, 1968 —Order of Re-Assignment of Judge Whipple

February 13, 1969—Opinion and Order denying motion to vacate sentence—Filed

March 13, 1969 —Notice of Appeal

November 28, 1969—Opinion and Judgment of the United States Court of Appeals for the Third Circuit.

February 10, 1970—Order of the United States Supreme Court extending petitioner's time to file petition to March 28, 1970.

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APPENDIX B

Opinion and Order

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 465—68

HAROLD KONIGSBERG,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

WHIPPLE, *District Judge*:

This is a motion brought by the petitioner, Harold Konigsberg, appearing pro se, pursuant to 28 U.S.C. § 2255 for an order vacating the sentence imposed in Criminal No. 31-62 (D.C.N.J. 1963), for the fixing of a date for a hearing and for the taking of testimony on the within motion. The petitioner was one of the defendants in the above indictment, and was subsequently tried by a jury, convicted and sentenced on July 16, 1963 to a term of ten years imprisonment. He thereupon appealed to the Court of Appeals for the Third Circuit from the judgment of conviction and sentence and that court affirmed and denied a petition for rehearing. *United States* v. *Konigsberg,* 336 F.2d 844 (3d Cir. 1964). His petition for a writ of certiorari was denied by the United States Supreme Court. *Konigsberg* v. *United States,* 379 U.S. 933 (1964). This is the first application before this court pursuant to § 2225.

As the basis of his motion, petitioner alleges that during the trial of the criminal action in 1963, there was a

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denial of his constitutional rights as to render the judgment vulnerable to collateral attack. Specifically, petitioner contends that the sentence imposed violated his *Fourth, Fifth* and *Sixth Amendment* rights in that (1) the petitioner's statements to the Federal Bureau of Investigation (FBI) were inadmissible as having been obtained in violation of his Sixth Amendment right to counsel; (2) the government suppressed favorable evidence hearing on petitioner's Fifth Amendment claim constituting a denial of due process of law; and (3) the petitioner had standing to attack the search and seizure as being violative of the Fourth Amendment.

It is not disputed that a § 2255 proceeding cannot be used to act as a substitute for a direct appeal of a conviction but rather is a collateral remedy which is available to the petitioner only if a basic fundamental right has been denied, and not merely as a routine review if the petitioner is dissatisfied with his sentence. See *Dirring* v. *United States*, 370 F.2d 862 (1st Cir. 1967); *Williams* v. *United States*, 365 F.2d 21 (7th Cir.), *cert. denied*, 385 U.S. 981 (1966). As a general rule, the doctrine of res judicata does not apply to a § 2255 motion. *Sanders* v. *United States*, 373 U.S. 1 (1963). However, there appears to be little doubt or disagreement that issues disposed of on appeal from the original judgment of conviction will not be reviewed again under § 2255 *if the precise issues were raised on direct appeal.* See *Baca* v. *United States*, 383 F.2d 154, 156 (10th Cir. 1967), *cert. denied*, 390 U.S. 929 (1968); *Sykes* v. *United States*, 341 F.2d 104 (8th Cir. 1965); *Frye* v. *United States*, 337 F.2d 385, 386 (7th Cir. 1964), *cert. denied*, 380 U.S. 925 (1965); *Lampe* v. *United States*, 288 F.2d 881 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 958 (1962).

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The petitioner urges that only through a hearing as provided for in § 2255 can he establish the allegations which have been enumerated above. This court is fully aware that § 2255 imposes an affirmative duty to look into the files and records of the case and only if they *conclusively show* that the petitioner is entitled to no relief, can this motion be dismissed without an evidentiary hearing (Emphasis added). *Brisco* v. *United States*, 368 F.2d 214 (3d Cir. 1966). Naturally, the production of the petitioner will be contingent upon the issues raised in a particular case. *United States* v. *Hayman*, 342 U.S. 205, 223 (1952). Therefore, the question arises whether petitioner is entitled to a hearing on his motion.

In *Sanders, supra*, at pp. 15-16 the Court discusses what standards should guide a federal court in granting a hearing pursuant to § 2255:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.
>
> (1) By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations.

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> So also, identical grounds may often be supported by different legal arguments, * * *, or be couched in different language, * * *.
>
> (2) The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application * * *.
>
> (3) Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground * * *."

This court is of the opinion that the rules enunciated in *Sanders, supra,* regarding the availability of successive § 2255 motions should also apply to a federal prisoner's first § 2255 application. Therefore, in applying the test in *Sanders, supra,* the federal trial court must consider whether there is a need for collateral relitigation or whether the petitioner is seeking another hearing with a different legal emphasis. See Judge Wright's dissenting opinion in *Thornton* v. *United States,* 368 F.2d 822, 831 (D.C. Cir. 1966). The relitigation of trial issues under different labels or on expanded allegations that could have been made in the first instance is not contemplated by § 2255. *DeWelles* v. *United States,* 372 F.2d 67 (7th Cir.), *cert. denied,* 388 U.S. 919 (1967). If, however, purely legal questions are involved, the applicant may be entitled to a hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. *Sanders, supra,* at 17.

Consequently, this court having reviewed the files and records of the proceedings of the petitioner, and in the exercise of its discretion will determine the motion from these sources without granting an oral hearing and without requiring the presence of the petitioner in this court.

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Before discussing the grounds urged by the petitioner, a review of the facts as disclosed by the record is necessary. The petitioner was one of several defendants, indicted, tried and convicted of unlawful possession of goods stolen from interstate commerce in violation of 18 United States Code § 659. The offenses charged centered around the hijacking of some men's suits, coats and wearing apparel of which approximately 1700 suits were brought to Bayonne, New Jersey, and placed in a garage located at 15 West 22nd Street. On January 11, 1962, the defendants, including petitioner, while at the above premises, were told they were under arrest by FBI agents and were taken into custody.[1]

The first ground for relief urged by the petitioner is that his statements to the FBI were inadmissible as having been obtained in violation of his right to counsel. The statement which the petitioner alleges was of an extremely prejudicial nature came into evidence at the 1963 federal trial through the testimony of Robert Straub, (Starub), FBI agent, as follows:

> "• • • Q. Mr. Straub, Friday afternoon when you were last testifying do you recall that you testified that you arrived back at the office with the defendant Konigsberg in a car I believe with Agent Roetzel, and I was asking you questions as to what transpired when you reached the F.B.I. office? Now I direct your attention to that time when you were in the F.B.I. office in the presence of the defendant and ask you what was said to you by the defendant Harold Konigsberg during the course of your conversation.

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[1] As to the remainder of the lengthy factual background and the surrounding circumstances involved herein, see *Konigsberg, supra*, at 845-847.

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> Mr. Brown: I object, if your Honor please, unless there are specific questions and answers and the time is set. Apparently this individual was there for some time.
>
> The Court: Objection overruled.
>
> A. Well, we sat down. We discussed the matter at hand, the arrest in Bayonne, and he stated, 'This is the first legitimate arrest the F.B.I. ever had me for.' We continued a discussion and he stated, 'That is one thing you guys have that I don't have, stool pigeons.'
>
> He was asked what he was doing in the garage and at first he stated, 'What garage?' and then later he stated he was trying to 'help a guy out.' * * *." [2]

If the legality of petitioner's detention has been decided adversely to him on direct appeal, in determining the right to § 2255 relief, the issue becomes whether adequate relief had been afforded at that time. During petitioner's 1963 federal trial, pursuant to the testimony of the FBI witnesses, as well as other evidence, the trial court found that while in custody he was fully and completely advised of his constitutional rights to the extent that he was notified of his right to counsel; he was warned before he made any statements that he was not required to make statements; and he was informed that anything he said could be used against him in a court of law. The Court of Appeals for the Third Circuit did not find any denial of a Sixth Amendment right to counsel and affirmed the trial court. In a petition for rehearing, petitioner argued that his statements to FBI Agents Straub and Robert Roetzel (Roetzel) were involuntary in light of *Escobedo* v. *Illinois*, 378 U.S. 478

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[2] Transcript in Crim. No. 31-62, pp. 907-908 (Vol. III).

(1964). The court concluded that "* * * [u]nder the evidence documented in our opinion, we found that the process in this case was investigatory, that it was uncontradicted that there had been no attempt to elicit a confession and that the facts of this matter differed radically from the Escobedo situation. We therefore supported the trial court's conclusion that Konigsberg's statements were voluntary and admissible into evidence." *Konigsberg, supra,* at 853.

The petitioner now argues that two factors having occurred between 1964 and 1968 cast his Sixth Amendment contention in a different light. The first contention is that "it became patently clear with *Miranda* v. *Arizona*, 384 U.S. 436 (1966) that the Court of Appeals in petitioner's case had misinterpreted the applicability of Escobedo." The second contention is that "petitioner was deprived of his freedom of action in a significant way at the time he made his incriminating statements and thus entitled to the Escobedo warnings.[3]

The petitioner was tried and convicted in 1963. The legality of his detention was raised and decided adversely to him on a direct appeal, *Konigsberg, supra,* and may not be relitigated. Petitioner's trial and conviction were completed prior to the effective date of both *Escobedo, supra,* and *Miranda, supra.* The rulings in each of these cases are not to be applied retroactively and are therefore inapplicable here. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). See also *Davis* v. *North Carolina,* 384 U.S. 737 (1966). However, petitioner asserts that their lack of retroactivity does not preclude him "from invoking the same safeguards as part of an involuntariness claim" although his trial has

[3] From petitioner's pro se brief, p. 9.

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already been completed. *Johnson, supra,* at 730. The Court of Appeals for the Third Circuit has already concluded that the petitioner had not been hindered or denied full and fair opportunity for consultation with his attorney and that his statements were voluntary and given with full knowledge of his right to counsel. In light of this background and in recognition that *Escobedo, supra,* and *Miranda, supra,* provide safeguards to protect the integrity of the truth determining process at trial, this court finds that this issue cannot serve as a basis for collateral relief.

The second ground for relief, urged for the first time by the petitioner in this matter, is that during the course of the original proceeding there was illegal suppression of evidence by the government which was favorable to the petitioner. Petitioner asserts that FBI Agents Straub and Roetzel changed or supplemented the testimony they had given at the 1963 federal trial, that in April 1967, during a New York Supreme Court hearing, these same FBI agents testified that petitioner was not permitted to speak to his lawyer until the incriminating statements were elicited from him; and it is further argued that this information was within the knowledge of the government during the 1963 federal trial. See *Brady* v. *Maryland,* 373 U.S. 83 (1963).

In *Lynott* v. *United States,* 360 F.2d 586, 588 (3d Cir. 1966), *cert. denied,* 386 U.S. 917 (1967), the court stated as a general rule that an allegation of fact in support of a § 2255 motion will ordinarily be accepted as true entitling the petitioner to an evidentiary hearing. *Hayman, supra; Marchibroda* v. *United States,* 368 U.S. 487, 489-96 (1962). If, however, the allegations of fact as raised by the petitioner are contradicted by the record made by the movant during the criminal proceeding, he is not entitled to relief and the § 2255 motion can be denied without a hearing.

It is clear that the government cannot knowingly use false evidence, including false testimony, to obtain a tainted conviction. Therefore, this court is duty bound to re-examine the evidentiary basis on which this allegation is founded to insure that there was not a deprivation of a constitutional right of the petitioner. A general allegation is made that FBI Agents Straub and Roetzel, who testified for the government, gave false testimony at the 1963 federal trial concerning whether petitioner had been permitted to consult with his attorney. In *United States* v. *Jenkins*, 281 F.2d 193, 194 (3d Cir. 1960), the court states that the alleged false testimony knowingly used by the government must be particularized and it must be asserted that the government was aware of the alleged perjury at the time of the trial. Thus, before a § 2255 motion may be granted on the ground of perjured testimony, the movant has the burden of so proving that allegation.

The petitioner points to the following testimony at the New York Supreme Court hearing:

> "Q. Did you let this defendant, when he at first asked and demanded to call his lawyer, at the time you gave him this warning, call his lawyer? A. If you are referring to in the automobile and you asked to make a phone call, we did not.
>
> Q. All right. Now when we got to the office, when you did let me call, it was three hours later, or two and a half hours later, from the time we entered the office; is that correct? A. I would say approximately that time, yes.
>
> Q. How many times would you say that you testified to that I requested—the words you used 'requested to call my lawyer,' prior to the time I called him? A. I'm sorry, you lost me there.
>
> Q. How many times did you testify to, at that trial, stating, when Mr. Brown asked you, 'How

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many times did he ask to call his lawyer?'—how many times did you say? A. I couldn't recall what I said.

Q. Well, how many times would you say I asked you? A. Well, as I say, you asked to use the phone.

Q. All right, Mr. Straub—— A. And I know you said, 'When can I call my attorney?' whether you asked——

Q. When I can call my attorney. Now I'm going to help you a little bit. This didn't come out in the record, and let me see how good your memory is Mr. Straub. You remember you and I sitting at the desk and Mr. Roetzel sitting on the side? A. Yes.

Q. Do you remember one time that I picked up the phone and Mr. Roetzel grabbed it, and you says to me, 'Aw Harold, that ain't necessary'—do you remember that? A. I think I do recall you grabbed a phone * * * ."[4]

"Q. Right. I was in the car with you. You made an arrest. I was under arrest. It was not investigatory, and I stated to you that I wanted to make a phone call several times; correct? A. Yes.

Q. So, therefore, you got this statement after I declared myself that I wanted to make calls. A. Yes.

Q. So your meaning, when you said that I had a right to an attorney and I wanted to call one, meant nothing * * *."[5]

"Q. Now, it was after the administration functions were finished that I made this call, correct? A. Yes.

Q. Was that the only reason I wasn't permitted to make the call, because you had administrative

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[4] Transcript of New York Supreme Court hearing, pp. 791-92.
[5] Transcript of New York Supreme Court hearing, pp. 789-99.

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functions? A. We had certain things that we had to get done.

Q. Like interrogating me? A. No.

Q. No. All right. Again was the phone right alongside of me? How much of an inconvenience would it have been to you if I used the phone? A. You used that phone.

Q. But when? When I asked, demanded or requested? A. At the time you picked it up.

Q. Did I use it at the time I picked it up? A. No.

Q. No. But you and Mr. Roetzel decided for me to use the phone, as you say, when you wanted it, not when I wanted to, because prior to that I tried to pick up the phone and make a call; is that correct? A. You tried to pick up the phone and make a call, yes.

Q. But I couldn't make the call at that time, could I? A. You didn't make the call * * *."[6]

This court is of the opinion after careful review that neither the transcripts of the 1963 federal trial nor the pertinent parts of the transcript of the 1967 New York Supreme Court hearing hereinabove quoted reveal any substantive discrepancies with regard to the factual allegations made by the petitioner concerning the "changed or supplemented" testimony of FBI Agents Straub and Roetzel even when the particularized evidence asserted here is considered most favorably to petitioner. To argue that the testimony of Straub and Roetzel was inconsistent does not indicate either perjury or suppression of favorable evidence by the government. A mere conclusionary statement of misconduct on the part of the government is not sufficient for relief.

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[6] Transcript of New York Supreme Court hearing, p. 807.

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The petitioner has not stated sufficient facts, which if they were true would entitle him to relief.

This is merely a collateral attempt by the petitioner to contradict the record made in the trial court in the 1963 federal trial. The record in this case completely contradicts petitioner's claim in this regard and compels the conclusion that in view of the allegations made and in view of the record and files, as well as the transcripts, this claim is without merit.

The third ground for relief urged by the petitioner is that he had standing to attack the search and seizure in the garage as being violative of the Fourth Amendment. This particular ground for relief, to wit: standing with regard to a claim of illegal search and seizure, was determined at petitioner's trial and was determined on the merits since it followed a motion to suppress. See *Townsend* v. *Sain*, 372 U.S. 293, 314 (1963). Further, the Court of Appeals for the Third Circuit affirmed the trial court on this point. The court took the position that *Jones* v. *United States*, 362 U.S. 257 (1960) was inapplicable in that narcotic cases are *sui generis*, recognizing the problems created by the possession of narcotics and decided that the *Jones* rule should not be extended to cases such as the present. The Court of Appeals reasoned that *Jones, supra*, was inapplicable because there "proof of possession was enough to convict" while in petitioner's case "possession is only one element of the crime charged." *Konigsberg, supra*, at 847.

Although there is some reason to believe that any constitutional claim is cognizable on collateral attack,[7] regard-

[7] See dissenting opinion in *Kuhl* v. *United States*, 370 F.2d 20, 30 (9th Cir. 1966); *United States* v. *Sutton*, 321 F.2d 221 (4th Cir. 1963); *Gaitan* v. *United States*, 317 F.2d 494 (10th Cir. 1963).

less of whether or not a similar claim was considered at the trial, it is settled in this circuit as in most other circuits[8] that a claim of illegal search and seizure ordinarily may not be successfully raised in a proceeding which constitutes collateral attack on the sentence, but must be presented in the appeal from the conviction.[9] See *Jenkins, supra,* at 193.

In *Thornton, supra,* at 829, the court noted "* * * in any event, the recent decisions broadening collateral review as an assurance of the federal judicial process to state accused afford no comparable collateral machinery to federal prisoners who have already had access to the federal judicial process: access to a federal trial judge—indeed under § 2255 to the same federal judge if available; access to an array of effective federal remedies for rooting out the fruits of unreasonable searches; and access to the federal appellate system." This court does not find any exceptional circumstances present to warrant an exception to the general rule prohibiting collateral review. Neither has petitioner demonstrated that a redetermination of this issue would serve the ends of justice. Therefore, collateral review is not available either on the law or by way of an evidentiary hearing inasmuch as there has been no showing that this ground for relief is cognizable by collateral attack or that the previous failure in the Court of Appeals does not bar collateral relief.

Having considered all the papers before me as well as the entire record of the prior proceedings by and against petitioner, I am of the opinion that under § 2255 there is

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[8] See *Thornton, supra,* at 824, Footnote 2; *DeWelles, supra.*

[9] It is unsettled, however, whether a claim of illegal search and seizure is forever foreclosed in a § 2255 proceeding, where, as here, a similar claim was considered at trial and upon a direct appeal.

no need for a hearing on any of the grounds raised by petitioner and that he is not entitled to the relief which he seeks.

It is on this 13th day of February, 1969, ORDERED that the motion of petitioner to vacate his sentence be and the same is hereby denied.

/s/ LAWRENCE A. WHIPPLE,
LAWRENCE A. WHIPPLE, U.S.D.J.

TO THE CLERK OF THE COURT:

Please mark as court exhibits in this case the following: (1) Petitioner's pro se Brief in Support of Motion to Vacate Sentence; (2) Transcript of 1967 New York Supreme Court hearing, pp. 338-385; (3) Transcript of 1967 New York Supreme Court hearing, pp. 760-816.

LAWRENCE A. WHIPPLE
United States District Judge

APPENDIX C

Notice of Appeal

(MOTION TO VACATE SENTENCE)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Docket #465-68

HAROLD KONIGSBERG,
Petitioner, Pro Se.,
Now! Appellant,

VS.

UNITED STATES OF AMERICA,
Respondent,
Now! Appellee.

Notice is hereby given that Harold Konigsberg the Petitioner Pro Se above named, hereby appeals to the United States Court of Appeals for the Third Circuit, * From the order of United States District Court Judge Lawrence A. Whipple, February 14, 1969 denying the Petitioner a Hearing on Title 28 Section 2255 United States Code. Motion to Vacate Sentence. *[Entered in the action on the 14th day of February, 1969].

HAROLD KONIGSBERG

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APPENDIX D

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17882

HAROLD KONIGSBERG,

Appellant,

v.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 10, 1969

Before McLAUGHLIN, FORMAN, and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 28, 1969)

PER CURIAM.

Harold Konigsberg appeals from a denial by the United States District Court for the District of New Jersey of his motion pursuant to 28 U.S.C. § 2255 to vacate a sentence of ten years imposed upon him in that court on July 16, 1963. He was convicted on an indictment charging him with possession of property stolen from interstate commerce in violation of 18 U.S.C. § 659. The conviction was affirmed in an opinion by this court [1] where the facts and arguments of the case were so fully explored as to make

[1] *United States* v. *Konigsberg*, 336 F.2d 844, *rehearing denied*, 336 F.2d 853 (3d Cir. 1964), *cert. denied*, 379 U.S. 933 (1964).

references to them here unnecessary unless they bear directly upon the issues of the instant appeal.

Appellant is principally aggrieved by the failure of the District Court to view favorably two grounds for his § 2255 motion which he urges originated after the affirmance of his conviction by this court in 1964. The first is his contention that testimony taken at a 1967 Supreme Court hearing [2] showed that during his 1963 trial there was illegal suppression by the Government of evidence which was favorable to him. Specifically, he argued that the thrust of this testimony demonstrated that the arresting Federal Bureau of Investigation agents refused to allow the appellant the use of a telephone to call his lawyer for several hours after his arrest.[3] Appellant urges that had this court

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[2] A New York State post-conviction hearing was held in the New York County Supreme Court to determine whether the appellant was a multiple felony offender.

[3] The District Court cited the following portions of the examination of Agent Straub by the appellant:

> "Q. Did you let this defendant, when he at first asked and demanded to call his lawyer, at the time you gave him this warning, call his lawyer? A. If you are referring to in the automobile and you asked to make a phone call, we did not.
>
> Q. All right. Now when we got to the office, when did you let me call, it was three hours later, or two and a half hours later, from the time we entered the office; is that correct? A. I would say approximately that time, yes.
>
> Q. How many times would you say that you testified to that I requested—the words you used 'requested to call my lawyer,' prior to the time I called him? A. I'm sorry, you lost me there.
>
> Q. How many times did you testify to, at that trial, stating, when Mr. Brown asked you, 'How many times did he ask to call his lawyer?'—how many times did you say? A. I couldn't recall what I said.
>
> Q. Well, how many times would you say I asked you? A. Well, as I say, you asked to use the phone.

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Q. All right, Mr. Straub—— A. And I know you said, 'When can I call my attorney?' whether you asked——

Q. When can I call my attorney. Now, I'm going to help you a little bit. This didn't come out in the record, and let me see how good your memory is Mr. Straub. You remember you and I sitting at the desk and Mr. Roetzel sitting on the side? A. Yes.

Q. Do you remember one time that I picked up the phone and Mr. Roetzel grabbed it, and you says to me, 'Aw Harold, that ain't necessary'—do you remember that? A. I think I do recall you grabbed a phone * * *." (Transcript of New York Supreme Court hearing, pp. 791-92).

"Q. Right. I was in the car with you. You made an arrest. I was under arrest. It was not investigatory, and I stated to you that I wanted to make a phone call several times; correct? A. Yes.

Q. So, therefore, you got this statement after I declared myself that I wanted to make calls. A. Yes.

Q. So your meaning, when you said that I had a right to an attorney and I wanted to call one, meant nothing * * *." (Transcript of New York Supreme Court hearing, pp. 798-99).

"Q. Now, it was after the administration functions were finished that I made this call, correct? A. Yes.

Q. Was that the only reason I wasn't permitted to make the call, because you had administrative functions? A. We had certain things that we had to get done.

Q. Like interrogating me? A. No.

Q. No. All right. Again was the phone right alongside of me? How much of an inconvenience would it have been to you if I used that phone? A. You used that phone.

Q. But when? When I asked, demanded or requested? A. At the time you picked it up.

Q. Did I use it at the time I picked it up? A. No.

Q. No. But you and Mr. Roetzel decided for me to use the phone, as you say, when you wanted it, not when I wanted to, because prior to that I tried to pick up the phone and make a call; is that correct? A. You tried to pick up the phone and make a call, yes.

Q. But I couldn't make the call at that time, could I? A. You didn't make the call * * *." (Transcript of New York Supreme Court hearing, p. 807).

Konigsberg v. *United States*, No. 465-68, pp. 8-10 (D.C.N.J. February 13, 1969).

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been informed of these facts at the time of its affirmance of the 1963 conviction, it would have been compelled by *Escobedo* v. *Illinois*[4] to exclude the incriminating statements.[5]

This argument, however, ignores the fact that the testimony given at the New York hearing did not reveal any substantive discrepancies from the testimony of the agents at the 1963 trial. There, one of the agents in question testified that the incriminating statements were freely offered by the appellant.[6] Moreover, both the trial court and this court on appeal found no evidence suggesting that there was a denial of counsel. In denying a petition for rehearing, it was concluded that:

> "Under the evidence documented in our opinion, we found that the process in this case was investigatory, that it was uncontradicted that there had been no attempt to elicit a confession and that the facts of this matter differed radically from the Escobedo situation. We therefore supported the trial court's conclusion that Konigsberg's statements were voluntary and admissible into evidence."[7]

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[4] 378 U.S. 478 (1964).

[5] Appellant adds that the subsequent Supreme Court decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), also makes it clear that this court erred in its decision that the incriminating statements did not fall within the purview of the *Escobedo* decision. However, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) holds that *Miranda* is not to be applied retroactively under circumstances similar to the instant case.

[6] Agent Straub testified that his talk with Konigsberg ". . . was more like a conversation than an interview." *Konigsberg* v. *United States*, 336 F.2d at 852.

[7] *Id.* at 853.

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The new testimony offered by appellant in no way contradicts the court's previous determination that at the time the incriminating statements were made the process of the case was investigatory and not accusatory. Due consideration of this testimony leaves us convinced that, contrary to the appellant's contentions, had the court been aware of it at the time of the appellant's direct appeal it would have had no effect on its ruling.

Appellant's second contention is that the District Court erred in not considering the question of his standing to contest the legality of a search and seizure which occurred during his arrest.[8] He argues that under the recent Supreme Court decision in *Kaufman* v. *United States*[9] the District Court was obligated to consider this question. Once having considered it, he contends that the decision in *Simmons* v. *United States*[10] would have required the District Court to grant the § 2255 motion since the *Simmons* decision, he argues, makes it clear that he had standing to challenge the legality of the search and seizure.

Kaufman, however, did not establish a mandatory rule controlling in all cases. The Court there held that questions concerning search and seizure were entitled to the same consideration in a § 2255 motion as other constitutional claims. But the Court also stated that

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[8] On the authority of the decisions in *Thornton* v. *United States*, 368 F.2d 822 (D.C. Cir. 1968) and *United States* v. *Jenkins*, 281 F.2d 193 (3d Cir. 1960), the District Court held in part that

> "a claim of illegal search and seizure ordinarily may not be successfully raised in a proceeding which constitutes collateral attack on the sentence, but must be presented in the appeal from the conviction."

Konigsberg v. *United States*, No. 465-68 (D.N.J., February 13, 1969).

[9] 394 U.S. 217 (1969).

[10] 390 U.S. 377 (1968).

> "when a request for relief under §2255 asserts a claim of unconstitutional search and seizure which *was tested by a motion to suppress at or before trial under Fed. Rule Crim. Proc. 41(e), the § 2255 court need not stop to review the adequacy of the procedure established by that rule. . .*" [11] (Emphasis supplied.)

Thus, where a federal court had an opportunity to consider the merits of the contention it is within the discretion of the § 2255 court whether or not to relitigate the issue. Since in this case there had been a motion to suppress at trial and a full consideration of the merits on appeal, we find that the District Court acted well within the bounds of proper discretion in refusing to consider the appellant's contention that he had standing to contest the search and seizure. Furthermore, assuming that the appellant had standing, it is noteworthy that both the trial court [12] and this court [13] found with ample ground that probable cause for arrest existed at the time of the search and seizure.

Appellant's additional argument on this appeal that because the jury was present during a portion of the hearing on the voluntariness of his incriminating statements he was denied a *Jackson* v. *Denno* [14] hearing is also without merit. Again, appellant is attempting to collaterally attack an issue raised on direct appeal and decided adversely to him. The conclusion already determined by this court is still apt:

> "Since Escobedo is inapplicable to the situation before us, the argument that Konigsberg's statement

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[11] 394 U.S. at 277.

[12] *United States* v. *Konigsberg*, No. 31-62 (D.C.N.J., July 10, 1963).

[13] *Konigsberg* v. *United States*, 336 F.2d at 848.

[14] 378 U.S. 368 (1964).

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was involuntary and therefore he was deprived of due process of law under Jackson v. Denno must fall." [15] (Citations omitted.)

The appellant's charge that the District Court erred in refusing to grant an evidentiary hearing on his petition is stripped of any substance by the failure of the file and the entire record to disclose a valid justification therefor. They were painstakingly reviewed by the District Judge under the standards enunciated in *Sanders* v. *United States.*[16]

The other arguments raised on this appeal are not worthy of discussion.

The order of the United States District Court for the District of New Jersey of February 13, 1969 denying appellant's motion to vacate his sentence will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[15] *Konigsberg* v. *United States*, 336 F.2d at 853. It is also noted that the *Jackson* decision did not hold that voluntariness hearings must be conducted outside the presence of the jury. See *Pinto* v. *Pierce*, 389 U.S. 31 (1967).

[16] 373 U.S. 1 (1963).

APPENDIX E

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,882

HAROLD KONIGSBERG,

Appellant,

vs.

UNITED STATES OF AMERICA.

(D. C. Civil Action No. 465-68)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ..... DISTRICT OF NEW JERSEY

Present: MCLAUGHLIN, FORMAN and ALDISERT,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 13, 1969, be, and the same is hereby affirmed. Costs taxed in favor of appellee.

Attest:

THOMAS F. QUINN,
Clerk.

November 28, 1969

APPENDIX F

Constitutional Provisions Involved

FOURTH AMENDMENT:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT:

"nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1368

HAROLD KONIGSBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. D) is reported at 418 F. 2d 1270. The opinion on direct review is reported at 336 F. 2d 844, certiorari denied, 379 U.S. 933.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1969. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to March 28, 1970. The petition, filed on March 30, 1970, is out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

383-630—70

QUESTION PRESENTED

Whether the district court committed error in denying without an evidentiary hearing petitioner's motion pursuant to 28 U.S.C. 2255 to vacate his sentence as having been imposed in violation of his Fourth, Fifth, and Sixth Amendment rights.

STATEMENT

In 1963, petitioner and several co-defendants were convicted in the United States District Court for the District of New Jersey of possessing goods, constituting part of an interstate shipment, valued in excess of $100 with knowledge the goods were stolen, in violation of 18 U.S.C. 659. Petitioner was sentenced to imprisonment for ten years. On appeal, the conviction was affirmed, 336 F. 2d 844, and this Court denied certiorari, 379 U.S. 933. Petitioner subsequently moved the district court pursuant to 28 U.S.C. 2255 to vacate his sentence, which motion was denied without a hearing (Pet. App. B). On appeal, the court of appeals affirmed, 418 F. 2d 1270 (Pet. App. D).

The evidence is set forth at length in the opinion of the court of appeals affirming petitioner's conviction (336 F. 2d 844). In pertinent part, it revealed that in December, 1961, an interstate shipment of more than 3,000 men's suits had been hijacked in Parksville, New York. Some time prior to January 10, 1962, an unnamed informant telephoned an FBI agent that "an apparently unlimited quantity of Bond suits" was being disposed of in the vicinity of the Hoo-Ha Bar, located in Bayonne, New Jersey. The informant, who had given FBI agents reliable infor-

mation in the past leading to the solution of crimes, recited specific manufacturers' label numbers on some of the garments. These numbers were checked and identified by the manufacturers as being among those included in the hijacked shipment.

Acting on the informant's corroborated information and on knowledge that the Hoo-Ha Bar was operated and patronized by persons having prior criminal records, FBI agents began a surveillance of the area. At about 8:20 p.m. on the evening of January 10, 1962, an automobile was seen by FBI agent Straub entering a garage located across the street from the Hoo-Ha Bar and, shortly thereafter, being driven out of the garage and parked nearby. After the driver left the car and entered the bar, agent Straub walked past the automobile and saw, with the aid of street lights, several suits with white tags lying on the back seat. This same back seat had been empty when observed in similar fashion by an FBI agent shortly before the car was driven into the garage. The next day the agents obtained a warrant to search the garage.

On resuming their surveillance during the evening of January 11, 1962, the agents observed several men, including the driver of the car seen the previous night, back a station wagon into the garage and then enter the garage and close the doors. An hour or so later, as the occupants began to raise the garage doors, the FBI agents, having stationed themselves in front of the garage, observed, with the aid of street lights and flash lights, piles of suits on the floor inside. The agents identified themselves as FBI men and announced that everyone then in the garage (which in-

cluded petitioner) was under arrest. The search warrant was not executed; however, the clothing inside the garage was seized.

Petitioner and the others were advised of their rights to remain silent and be represented by counsel. They were driven in several ordinary passenger cars to the FBI office in Newark. After being fingerprinted and photographed, petitioner, who had $11,000 on his person, meticulously counted the money with agent Straub. He was then asked if he desired to explain his presence in the garage. Petitioner replied this was the only legitimate arrest the FBI ever made of him; there was one thing he didn't have, and that was stool pigeons, and his purpose in being in the garage was "to help a fellow out."

ARGUMENT

As noted, the petition for a writ of certiorari is out of time. Even if petitioner had filed within the period prescribed, however, the issue presented would not have warranted further review by this Court. The right to an evidentiary hearing on a Section 2255 motion collaterally attacking sentence is not absolute. The statute imposes upon the sentencing court an affirmative duty to look into the files and records of the case in light of the pending motion and grant a hearing if such examination *fails* to demonstrate conclusively that the movant is entitled to no relief. See *Brisco* v. *United States*, 368 F.2d 214 (C.A. 3). Petitioner does not here assert the district court failed to make a thorough examination of the files and records of the case, but rather, conceding that point (Pet.

6-7), quarrels with the court's conclusion after proper examination—"* * * under § 2255 there is no need for a hearing on any of the grounds raised by petitioner" (Pet. 14a–15a)—and with the per curiam affirmance of that conclusion in the court of appeals. The three grounds which serve as a predicate for petitioner's 2255 motion present no legal basis for granting the relief sought.

1. Petitioner first asserts that testimony of FBI agent Straub in a post-conviction hearing held in the New York County Supreme Court (Pet. 18a–19a) conflicts with agent Straub's testimony at trial and has a direct bearing on the admissibility of petitioner's incriminating statements introduced into evidence. In substance, the new testimony shows that petitioner's statements were made some time after he expressed to agent Straub a desire to telephone his counsel but before he actually placed the call. As the courts below noted, this testimony did not conflict with any evidence adduced at trial nor change the conclusion that the statements were freely and voluntarily given.[1] (Pet. 12a, 20a–21a).

[1] The trial court's ruling on voluntariness is set forth in the opinion of the court of appeals as follows (336 F. 2d at 852):

> As I stated before, I find from the testimony I have heard that the statements made by the defendant Harold Konigsberg when he was in custody were not involuntary statements but on the contrary that they were made voluntarily by him and he had been advised of his rights to counsel and of the fact that anything he might state could be used against him. He was, as I find from the testimony, warned before he made any state-

The admissibility of petitioner's statements to agents Straub and Roetzel received thorough consideration on direct review. The court below at that time found, and petitioner does not now deny, that prior to making the statements petitioner had been fully advised of his constitutional rights; that evidence of numerous earlier arrests and a prior conviction for robbery demonstrated petitioner was no innocent novice whose will could easily have been overcome by police psychology; that petitioner had at no time been subjected to grueling inquiry focussed upon him alone for the purpose of extracting a confession; that the statements were elicited during casual conversation incidental to administrative tasks of fingerprinting and photographing; and that the nature of the statements fell far short of a confession and indeed were only potentially incriminating admissions. In these respects petitioner's case was properly distinguished from *Escobedo* v. *Illinois,* 378 U.S. 478, and his statements were held to have been voluntary and admissible.

Petitioner now argues, however, that had the court of appeals been aware of the later-testimony at the time it affirmed the 1963 conviction, it would have

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ments that he was not required to make statements, that any statements he did make could be used against him.

He was likewise advised of his right to counsel.

There is no evidence of any intimidation, no evidence, circumstantial or otherwise, that he was under duress or that any hope of reward or promise of leniency were held out to him to induce statements.

He might well have chosen to refuse to say anything. He chose to make comments, and the text of them would indicate the voluntary nature.

been compelled by *Escobedo* v. *Illinois, supra,* to exclude the incriminating statements as involuntary in light of the "totality of circumstances" (Pet. 12). He premises this argument on the assertion that *Escobedo* can here be read in light of the subsequent decision of this Court in *Miranda* v. *Arizona,* 384 U.S. 436, 444-445, which precludes questioning of an individual in custody who makes known a desire first to consult counsel, notwithstanding this Court's determination in *Johnson* v. *New Jersey,* 384 U.S. 719, that *Miranda* shall not be applied retroactively (Pet. 16). Both courts below flatly rejected this latter proposition (Pet. 8a–9a, 20a). In addition, they concluded that the testimony given at the New York hearing did not contain "any substantive discrepancies" (Pet. 20a) from the trial testimony of the agents scrutinized on direct appeal. Accordingly, this ground serves no basis for collateral relief.

2. Petitioner next contends the courts below erred in denying him standing to contest the legality of a search and seizure which occurred during arrest and he relies on the recent decision of this Court in *Kaufman* v. *United States,* 394 U.S. 217, to raise the Fourth Amendment question in his Section 2255 motion. This argument overlooks the fact that the legality of the search of the garage and seizure of the clothing therein was fully litigated on petitioner's motion to suppress at trial and on direct appeal (see the government's briefs in opposition in *Konigsberg* v. *United States,* O.T. 1964, No. 596, and in the companion case, *Celso* v. *United States,* O.T. 1964, No. 492), and, in both

instances, the courts below decided against petitioner on the issue of standing *and alternatively,* on the issue of probable cause for arrest at the time of the search and seizure.

In addition, in opposing petitioner's 1964 petition for a writ of certiorari seeking review by this Court of the decisions below, the government chose not to rely upon the argument that petitioner lacked standing as justification for the admissibility of the evidence, but based its argument solely upon the alternative finding of the lower courts that, in all events, the search was incident to a lawful arrest. Accordingly, even if it is assumed petitioner may raise his Fourth Amendment question on collateral attack (*Sanders* v. *United States,* 373 U.S. 1, cf. *Kaufman* v. *United States, supra*), it is clear he is here entitled to no relief absent some showing of error in the findings relating to probable cause. There is nothing in petitioner's argument on the search and seizure question (Pet. 19–25), however, to indicate the existence of such error, except perhaps, his passing reference to this Court's recent decision in *Spinelli* v. *United States,* 393 U.S. 410 (Pet. 22–23). To the extent this case has any application to the earlier findings of probable cause by the trial court and the court of appeals (after full consideration of the merits), it is clear that even a reading of *Spinelli, supra,* most favorable to petitioner would not warrant relief nor justify a hearing on petitioner's 2255 motion.

3. Finally, petitioner argues that because the jury was present during a portion of the hearing on the issue of the voluntariness of his incriminating state-

ments, he was deprived of due process of law, citing *Jackson* v. *Denno,* 378 U.S. 368. Collateral attack of the sentence on this ground is warranted only if petitioner can demonstrate that the trial court and the court of appeals erred in deciding that the incriminating statements did not fall within the purview of the *Escobedo* decision. As already pointed out, both courts below found the testimony of agent Straub in the New York post-conviction hearing singularly unpersuasive in this regard. Since that testimony was insufficient, after thorough examination of the files and records of the case, to raise even a mere suggestion that the incriminating statements were anything other than voluntary, petitioner's argument that he was deprived of due process of law under *Jackson* v. *Denno, supra,* is totally without merit.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

APRIL 1970.

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MAY 14 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1368

HAROLD KONIGSBERG,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

THE PETITIONER'S REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANK A. LOPEZ,
Member of the
Bar of the Supreme Court
of the United States,
Attorney for Petitioner
HAROLD KONIGSBERG,
Office & P. O. Address,
44 Court Street,
Brooklyn, New York 11201
Telephone (212) 522-0760.

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ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF FOR THE PETITION FOR A WRIT OF CERTIORARI

Reply—Jurisdiction

Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari in the instant matter to Saturday, March 28th, 1970. On March 26th, 1970, the petition was served by mail upon respondents and forwarded to the Office of the Clerk of this Honorable Court with appropriate fees and certificate of service on the assurance from the United States Post Office that there would be no difficulty in mail delivery by Saturday, March 28th, 1970, from New York City to Washington, D.C. The petition was filed on March 30th, 1970. The jurisdiction of this Court is respectfully invoked under 28 U.S.C. § 1254(1) and is not lost by the one-day delay (Pet.'s Appendix G, p. 26a).

Reply—Statement of the Case

In the Government's brief in opposition to the petition the following facts are recited which require judicial cognizance:

1. The Respondent claims that an informant who supplied information previously was reliable. The fact is that nowhere in the trial record or in the pre-trial suppression hearing is there any evidence to support such a conclusion. As a matter of fact the Trial Court precluded inquiry by defense counsel into that very question. Moreover, it is of paramount interest that the Government obtained a search warrant in the instant case and in the affidavit in support of same there was neither allusion nor mention of an informant. The informant developed for the first time at the pre-trial suppression hearing. In making the arrest and search it was the Government's claim that the Trial Court's ruling was based on *probable cause* and not the search warrant the FBI had gone to the effort of obtaining.

2. The Government creates the impression that an FBI agent "saw with the aid of street lights, several suits with white tags lying on the back seat" (Resp. 3) of a car which had emerged from the garage in question.[1] This automobile was in no way connected to the Petitioner and the inference created that the FBI had prior knowledge that the suits on the back seat were actually related to an interstate theft is no way supported by the trial evidence. The fact is that the determination was made after the arrest and not before.

3. The Government concedes in its opposition brief the most crucial fact in issue. Both the Trial Court and the

---

[1] The garage was the place of the arrest and where the stolen property was found.

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United States Court of Appeals for the Third Circuit maintained that the Petitioner's alleged incriminatory statement was made during an *investigatory stage* and that therefore the right to counsel and self-incrimination did not attach. To so find it was necessary for the Trial Court and the Court of Appeals to rule that the Petitioner was not within the accusatory stage. The Court of Appeals in *United States* v. *Konigsberg,* 336 F.2d 844 (3rd Cir. 1964) at page 852, indicated:

> (when) "F.B.I. agents talked with Konigsberg the process was definitely investigative and never shifted to accusatory."

The Government on its re-examination of the record in the instant matter now concedes (Resp. 3-4):

> "The agents identified themselves as FBI men and announced that everyone then in the garage (which included petitioner) was under arrest. The search warrant was not executed; however, the clothing inside the garage was seized."

There can be no question over the fact that at the time the alleged admission was claimed the process was accusatory and that therefore Petitioner's Fifth and Sixth Amendment rights attached. It was only after the arrest and the subsequent seizure and examination of the clothing inside the garage was the determination made that the property was the actual subject matter of an interstate theft. Moreover, after the arrest, petitioner demanded counsel, petitioner was proferred rights to counsel by arresting officers, who then physically and violently restrained him from calling his attorney at FBI Headquaters when petitioner grabbed a telephone in frustration.

4. In the opposition brief, the Government creates the inference that petitioner's statement was spontaneous or a voluntary declaration during the course of a *chat* with FBI officers (Resp. 4).

> "He was then asked if he desired to explain his presence in the garage. Petitioner replied this was the only legitimate arrest the FBI ever made of him; there was one thing he didn't have, and that was stool pigeons, and his purpose in being in the garage was 'to help a fellow out'."

Even accepting the Government's contention, it is apparent that once under arrest and demand for counsel is made the subterfuge employed by the arresting officers of giving the Petitioner a chance to explain his presence was nothing less than *interrogation.*

Reply—Argument

Respondent maintains that Petitioner concedes that the District § 2255 Court made a thorough examination of the files and record of the case but only quarrels with the Court's conclusion after proper examination (Resp. 4-5). This of course is not the case at all. Petitioner indicated in his petition that *"it was District Court Judge Whipple's opinion . . ."* (Stress supplied) that an evidentiary hearing was unnecessary. This was not the view of the Petitioner who claimed (Pet. 12), "A hearing would have determined if Konigsberg was deliberately secreted from his then counsel. . . . Had District Court Judge Whipple in his Opinion-Order permitted a hearing the Petitioner would have more fully developed the facts of this delayed arraignment as reflecting upon the issue of voluntariness" (Pet. 12). Moreover the evidentiary hearing would have given Petitioner opportunity to establish his contentions relating to the testimony of FBI Agents Straub and Roetzel, the latter claiming that he took alternative turns in watching Petitioner at FBI—headquarters (Trial Rec. 346), with FBI Agent Straub, an inconsistency with the New Jersey District Court testimony which was *contra* to his New York Supreme Court evidence.

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1. Respondent argues that the purported "statements were elicited during casual conversation incidental to administrative tasks of fingerprinting and photographing; and that the nature of the statements fell far short of a confession and indeed were only potentially incriminating statements" (Resp 6). Unfortunately the Trial Court felt otherwise and ruled the admission *"a very incriminatory statement or statements"* (Stress Supplied, Trial Record, 868).

The Government cannot have it both ways. Either the Petitioner was not an "innocent novice" (Resp. 6) and therefore as a sophisticated criminal fully aware of the underworld guideline by the *mouth does the fish die* or he was in fact an "innocent novice" who was deluded into making the statements in question. The Government can not dispute that this conviction hangs by the thread of an incriminatory statement. The Government concedes that previous to the alleged statement, the Petitioner was (a) under arrest; (b) advised of his right to counsel; (c) Petitioner demanded counsel and was physically and violently restrained from calling his attorney and (d) that actual interrogation was underway under the guise of giving the Petitioner an opportunity to explain.[2]

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[2] Had Petitioner been permitted the telephone call certain FBI records of outgoing telephone calls on such an important issue would have reflected it and Petitioner's testimony to the contrary at the trial proper would have exposed him to a perjury charge. The Government therefore does not dispute this fact. In giving Konigsberg a chance to explain his presence in the garage we are to be deluded into believing that the FBI after going through an entire arrest procedure would permit Petitioner to leave unhindered. Such an argument is specious and is offensive to reason. It is curious that the FBI claimed to have fingerprinted Petitioner. Is this not the task of the United States Marshal previous to arraignment?

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The Court of Appeals and the Trial Court permitted the incriminatory statement into evidence on the basis that at the time petitioner was within the *investigatory process* and thus rights to counsel and against self-incrimination were not brought into interplay. The respected Court of Appeals for the Third Circuit in *Daley* v. *Yeager*, 415 F.2d 779 (1969), held at p. 783:

> "Once the prosecution has commenced, law enforcement officers may not secure concessions from an accused which circumvent the protections a lawyer might provide."

This same Circuit held in *Billingsley* v. *New Jersey*, 408 F.2d 1181 (3rd Cir. 1969), at page 1183:

> "We therefore conclude that the rule of Escobedo can only be invoked by a defendant who has requested and been denied counsel."

It is therefore clear that on the information available to it at the time the District Trial Court and the Court of Appeals in the consideration of the direct appeal ruled that when Petitioner made the statement in question the process was merely investigatory. In view and in the light of recent decisions and the newly acquired evidence as to the force and restraint used by the arresting officers against Petitioner in preventing him calling his attorney a fact-finding hearing is necessary in order to determine the total circumstances on the admissibility of the purported statement.

At no time did Petitioner waive his right to counsel having previously requested the assistance of an attorney. The Government agents offered Petitioner his right to counsel and then declined to make it possible for him to call a lawyer to his aid. As the record does not justify a waiver of counsel, it is clear that the FBI agents deliberately and in the absence of counsel engaged a frustrated

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Petitioner in a subtle form of interrogation claiming to afford him a chance to explain his presence in the garage. This was after physically and violently restraining him from calling the very attorney they claimed it was his constitutional perogative to call. The Trial Court and the Court of Appeals in direct review permitted the admission of the incriminatory statement into evidence and thus sustained the conviction by characterizing it as elicited during the investigatory stage. The most important demand for relief in this petition is for a § 2255 hearing in the District Court to enable Petitioner to develope all the circumstances under which the alleged statement was elicited. In this way the § 2255 Court will have an opportunity to hear all the evidence and make a fair determination of the facts in the light of existing and applicable law.

2. As one of the grounds for his § 2255 collateral attack on the conviction, Petitioner urged that during a pretrial suppression hearing the District Trial Court denied him standing to contest the legality of the search. The Government maintains (Resp. 7):

> "This argument overlooks the fact that the legality of the search of the garage and seizure of the clothing therein was fully litigated on petitioner's motion to suppress at trial and on direct appeal . . ."

The § 2255 Court, however, never reached the issue on the matter of merit but based its decision exclusively on the principle that a Fourth Amendment attack upon a conviction is not cognizable under collateral attack (Pet. 14a):

> ". . . it is settled in this circuit as in most other circuits that a claim of illegal search and seizure ordinarily may not be successfully raised in a proceeding which constitutes collateral attack on the sentence but must be presented in the appeal from the conviction. . . . This Court does not find any exceptional circumstances present to warrant an ex-

> ception to the general rule prohibiting collateral review. . . . Therefore, collateral review is not available either on the law or by way of an evidentiary hearing inasmuch as there has been no showing that this ground for relief is cognizable by collateral attack or that the previous failure in the Court of Appeals does not bar collateral relief."

The § 2255 Court therefore did not consider any other issue on the Petitioner's Fourth Amendment attack upon his conviction. In the affirmance of the § 2255 District Court opinion, the United States Court of Appeals considered *Kaufman* v. *United States,* 394 U.S. 217 (1969), which the District Court did not since this Court had not rendered its decision in that litigation at the time. The Third Circuit added that in any event there was a pre-trial suppression hearing and even though Petitioner was adjudged not to have standing the Government's search was held to have been valid in any event (Pet. 22a).

Petitioner reiterates the posture adopted in his Petition in that he must first have standing to attack an unconstitutional search against him *before* he can reach the merits of his contentions. The Government maintains that the search was justified but that in any event the Petitioner had no standing to attack it and no standing now to challenge it in a § 2255 proceeding.

An evidentiary hearing on this matter would have permitted Petitioner to establish standing and if this contention were favorably ruled he would then have been in a position to successfully show independent and interplay violations of his rights under the Fourth and Sixth Amendments.[3]

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[3] The Respondent herein invites inquiry into what facts the Petitioner would have brought to the attention of the § 2255 Court that were not fully litigated before the Trial Court. What

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3. A third contention raised by Petitioner was the denial of a *Jackson* v. *Denno,* 378 U.S. 368 (1964) hearing. The Government in dismissing Petitioner's contention (Resp. 9):

> "Collateral attack of the sentence on this ground is warranted only if petitioner can demonstrate that the trial court and the court of appeals erred in deciding that the incriminating statements did not fall within the purview of the *Escobedo* decision."

Petitioner was entitled to an independent inquiry outside the presence of the jury during the course of his trial on the issue of voluntariness. It was the duty of the Trial Court to adequately pass upon this issue before submitting it to the jury. For this purpose an adequate procedure was required. Petitioner's counsel at trial asked for such a hearing (R. 845). The Trial Court agreed that it should make such a determination outside the presence of the jury (R. 868). The flaws in the procedure adopted by the Trial Court prevented a due process determination on the issue of voluntariness. The jury had already begun to hear the testimony of FBI Agent Straub when the Court interrupted and continued it outside the presence of the jury. However, the Court did not provide for a procedure in which all witnesses including the petitioner-defendant and other defense witnesses could be heard at this hearing so as to enable it to consider a *totality of circumstances* governing this *"very incriminatory statement or statements"* (Shaw, *J;* R. 868). Instead, the Court permitted Straub

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is not before this Court in factual detail and which would be brought to light in an evidentiary hearing is that Petitioner was never informed of a suppression hearing, was never present at the suppression hearing, was never told to be at a suppression hearing, was never consulted about the suppression hearing, and was not present at this stage of the most crucial proceeding in the entire case since the conviction finally obtained by the Government involved a crime of possession. The Petitioner cannot reach the issue of merit until the issue of standing has been fully litigated and his opportunity to be heard established.

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to continue his testimony before the Court and later to resume his testimony where he left off before the jury. Furthermore other witnesses testified to the statements in question in the jury's presence previous to an initial determination by the Court. It is significant that Roetzel, an FBI agent, testified that he was not present at all times when Konigsberg was in custody but took turns with FBI Agent Straub. Roetzel's testimony was not cumulative of Straub for it was his evidence that he took turns with Straub in watching and/or handling Petitioner. It was therefore necessary for Petitioner to inquire from Roetzel outside the presence of the jury what effect his own conduct had on the issue of voluntariness.

Once again the Government indicates that in view of the fact that Petitioner's claim as to the statement was considered under *Escobedo* it need not now be subject to *Jackson*.

The Government does not dispute the inadequacy of the Court's attempt to satisfy a *Jackson* hearing. It disputes that Petitioner's statement was actually incriminatory taking exception with the opinion of the Trial Court and its own position at trial. The fact is Petitioner argues for a hearing under *Jackson* in which he can develop the totality of circumstances involving all case law applicable to his contentions on the issue of voluntariness.

CONCLUSION

The petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK A. LOPEZ,
Member of the Bar of the
Supreme Court of the United States,
Attorney for Petitioner.

May 12, 1970.

APPENDIX G

(Telegram to Clerk of the United States Supreme Court)

Clerk of the
Supreme Court of the U.S.A.
Washington, D.C.

May 10, 1970

REFERENCE PETITION CERTIORARI 1368 OCT 1969 REPLY PETITIONER WILL BE FORWARDED MAY 12th STOP RESPECTFULLY DRAW YOUR ATTENTION EXTENSION FOR FILING PETITION TO SATURDAY MARCH 28 WHICH WAS MAILED NEW YORK CITY THURSDAY MARCH 26 ON ASSURANCE U.S. POST OFFICE TIMELY DELIVERY SATURDAY MARCH 28. PETITION NOT FILED UNTIL MONDAY, MARCH 30, 1970, SINCERELY REGRET ONE-DAY WEEK-END DELAY.

Sender's Tel. No. 522-0760

Frank A. Lopez,
Attorney
44 Court Street,
Brooklyn, N. Y. 11201